

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

KHOSHABA KIRRIO, an individual
d/b/a ZAKHO CONSTRUCTION,

Plaintiff,

vs.

Case No. 2005-3688-CK

KM&R LLC,
a Michigan limited liability company;
KARIM MATTI a/k/a KARIM MATTY,
an individual;
UNISEN, INC.,
a Michigan corporation; and
WARREN BANK MORTGAGE COMPANY,
LLC, a Michigan limited liability company;
Jointly and Severally,

Defendants.

OPINION AND ORDER

Defendants KM&R L.L.C. and Karim Matti move to quash the lien and for partial summary disposition.

I. BACKGROUND

Plaintiff Khoshaba Kirio¹ filed this action on September 15, 2005 asserting he contracted with defendants KM&R and Matti to construct a gas station at 13535 East 14 Mile Road (Sterling Heights).² Plaintiff first furnished services, labor and materials on August 10, 2002. Plaintiff completed work worth \$126,439.06 as of July 22, 2004 but was only paid \$53,000, leaving a balance due of \$73,439.06 that defendants KM&R and Matti have refused to pay.

¹Plaintiff's surname is misspelled in the case caption.

²Defendants Unisen, Inc. and Warren Bank Mortgage Company, L.L.C. have been named because they have



Plaintiff served a Notice of Furnishing on September 21, 2004.

Accordingly, plaintiff's complaint alleges: I. Breach of Contract against defendants KM&R and Matti; II. Unjust Enrichment against defendants KM&R and Matti; III. Promissory and Equitable Estoppel against defendants KM&R and Matti; IV. Violation of the Michigan Builders' Trust Fund Act, MCL 570.151 *et seq.*, against defendants KM&R and Matti; and V. Foreclosure of Lien against all defendants.

Defendants KM&R and Matti now move to quash the lien and for partial summary disposition.

II. STANDARD OF REVIEW

A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. The reviewing court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence available to it in the light most favorable to the nonmoving party. *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000). The nonmoving party must proffer evidence establishing a material issue of disputed fact exists for trial to avoid summary disposition. *Id.*

III. ANALYSIS

In *J Propes Electric Co v DeWitt-Newton, Inc.*, 97 Mich App 295, 300; 293 NW2d 801 (1980), the court stated:

Whether labor and material furnished within the statutory period but after the contract has been substantially completed were furnished in good faith and for the purpose of completing the contract or to revive the lien is a question of fact. *Neely v International Corn Products Corp.*, 232 Mich 81, 86; 205 NW 96 (1925). *Sacchetti v Recreation Co.*, 304 Mich 185, 190; 7 NW2d 265 (1943).

In the instant matter, plaintiff testified the work performed on July 22, 2004 consisted of repair work to a lock. He also stated he had documentation of this repair visit. The work was

interests in the property.

performed at the request of defendant Matti presumably because of plaintiff's role as the general contractor for the project (i.e., was performed in furtherance of the project and while the contract was still in effect). There is no evidence suggesting the work was not done, did not benefit the project or was done in an unworkmanlike manner.

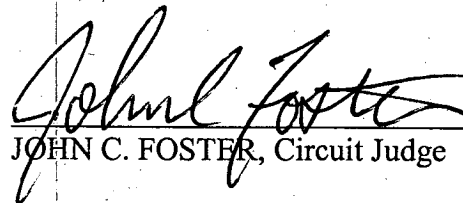
Significantly, defendant Matti's interrogatory answers aver plaintiff did not finish all the work on the project. While he also contends final building approval was sought in August 2003, this contrary attempt to claim construction was complete more than a year before the lien was filed merely creates a question of fact precluding entry of summary disposition.

IV. CONCLUSION

For the reasons set forth above, defendants KM&R L.L.C. and Karim Matti's motion to quash the lien and for partial summary disposition is DENIED under MCR 2.116(C)(10).

This *Opinion and Order* neither resolves the last pending claim in this matter nor closes the case. MCR 2.602(A)(3).

IT IS SO ORDERED.


JOHN C. FOSTER, Circuit Judge

Dated: August 28, 2006

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